



Reprinted
March 1, 2005

SENATE BILL No. 509

DIGEST OF SB 509 (Updated February 28, 2005 8:12 pm - DI 106)

Citations Affected: IC 24-5.

Synopsis: Right to cure for deceptive acts. Defines an offer to cure a deceptive act as a cure that: (1) is reasonably calculated to remedy the consumer's loss; and (2) includes an additional amount of the greater of 10% of the value of the cure or \$500. Provides that: (1) the court may award additional damages for a willful deceptive act; (2) an offer to cure is only admissible as evidence in a proceeding to show that a party is not entitled to attorney's fees; and (3) a respondent may not be held liable for attorney's fees and court costs unless the actual damages awarded exceed the value of the offer to cure. Specifies that the real estate exclusion for uncured deceptive acts under this section includes a claim involving a construction defect that is brought against a construction professional.

Effective: July 1, 2005.

Clark

January 18, 2005, read first time and referred to Committee on Corrections, Criminal, and Civil Matters.
February 24, 2005, amended, reported favorably — Do Pass.
February 28, 2005, read second time, amended, ordered engrossed.

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SB 509—LS 7797/DI 110+



First Regular Session 114th General Assembly (2005)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2004 Regular Session of the General Assembly.

SENATE BILL No. 509

A BILL FOR AN ACT to amend the Indiana Code concerning trade regulation.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 24-5-0.5-2 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 2. (a) As used in this
3 chapter:

4 (1) "Consumer transaction" means a sale, lease, assignment,
5 award by chance, or other disposition of an item of personal
6 property, real property, a service, or an intangible, except
7 securities and policies or contracts of insurance issued by
8 corporations authorized to transact an insurance business under
9 the laws of the state of Indiana, with or without an extension of
10 credit, to a person for purposes that are primarily personal,
11 familial, charitable, agricultural, or household, or a solicitation to
12 supply any of these things. However, the term includes a transfer
13 of structured settlement payment rights under IC 34-50-2.

14 (2) "Person" means an individual, corporation, the state of Indiana
15 or its subdivisions or agencies, business trust, estate, trust,
16 partnership, association, nonprofit corporation or organization, or
17 cooperative or any other legal entity.



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(3) "Supplier" means:

(A) a seller, lessor, assignor, or other person who regularly engages in or solicits consumer transactions, including a manufacturer, wholesaler, or retailer, whether or not ~~he~~ **the person** deals directly with the consumer; or

(B) a person who contrives, prepares, sets up, operates, publicizes by means of advertisements, or promotes a pyramid promotional scheme.

(4) "Subject of a consumer transaction" means the personal property, real property services, or intangibles furnished in a consumer transaction.

(5) "Cure" as applied to a deceptive act, means either:

(A) to offer in writing to adjust or modify the consumer transaction to which the act relates to conform to the reasonable expectations of the consumer generated by such deceptive act and to perform such offer if accepted by the consumer; or

(B) to offer in writing to rescind such consumer transaction and to perform such offer if accepted by the consumer.

The term includes an offer in writing of one (1) or more items of value, including monetary compensation, that the supplier delivers to a consumer or a representative of the consumer if accepted by the consumer.

(6) "Offer to cure" as applied to a deceptive act is a cure that:

(A) is reasonably calculated to remedy a loss claimed by the consumer; and

(B) includes a minimum additional amount that is the greater of:

(i) ten percent (10%) of the value of the remedy under clause (A), but not more than four thousand dollars (\$4,000); or

(ii) five hundred dollars (\$500);

as compensation for attorney's fees, expenses, and other costs that a consumer may incur in relation to the deceptive act.

~~(6)~~ (7) "Uncured deceptive act" means a deceptive act:

(A) with respect to which a consumer who has been damaged by such act has given notice to the supplier under section 5(a) of this chapter; and

(B) either:

(i) no offer to cure has been made to such consumer within thirty (30) days after such notice; or

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(ii) the act has not been cured as to such consumer within a reasonable time after ~~his~~ **the consumer's** acceptance of the offer to cure.

~~(7)~~ **(8)** "Incurable deceptive act" means a deceptive act done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead. The term includes a failure of a transferee of structured settlement payment rights to timely provide a true and complete disclosure statement to a payee as provided under IC 34-50-2 in connection with a direct or indirect transfer of structured settlement payment rights.

~~(8)~~ **(9)** "Pyramid promotional scheme" means any program utilizing a pyramid or chain process by which a participant in the program gives a valuable consideration exceeding one hundred dollars (\$100) for the opportunity or right to receive compensation or other things of value in return for inducing other persons to become participants for the purpose of gaining new participants in the program. The term does not include ordinary sales of goods or services to persons who are not purchasing in order to participate in such a scheme.

~~(9)~~ **(10)** "Promoting a pyramid promotional scheme" means:

(A) inducing or attempting to induce one (1) or more other persons to become participants in a pyramid promotional scheme; or

(B) assisting another in promoting a pyramid promotional scheme.

~~(10)~~ **(11)** "Elderly person" means an individual who is at least sixty-five (65) years of age.

(b) As used in section 3(a)(15) of this chapter:

(1) "Directory assistance" means the disclosure of telephone number information in connection with an identified telephone service subscriber by means of a live operator or automated service.

(2) "Local telephone directory" refers to a telephone classified advertising directory or the business section of a telephone directory that is distributed by a telephone company or directory publisher to subscribers located in the local exchanges contained in the directory. The term includes a directory that includes listings of more than one (1) telephone company.

(3) "Local telephone number" refers to a telephone number that has the three (3) number prefix used by the provider of telephone service for telephones physically located within the area covered by the local telephone directory in which the number is listed. The

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term does not include long distance numbers or 800-, 888-, or 900- exchange numbers listed in a local telephone directory.

SECTION 2. IC 24-5-0.5-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 4. (a) A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act **or five hundred dollars (\$500), whichever is greater. The court may increase damages for a willful deceptive act in an amount that does not exceed the greater of:**

(1) three (3) times the actual damages of the consumer suffering the loss; or

(2) one thousand dollars (\$1,000).

Except as provided in subsection (j), the court may award reasonable attorney fees to the party that prevails in an action under this subsection. This subsection does not apply to a consumer transaction in real property, **including a claim or action involving a construction defect (as defined in IC 32-27-3-1(5)) brought against a construction professional (as defined in IC 32-27-3-1(4)),** except for purchases of time shares and camping club memberships. Actual damages awarded to a person under this section have priority over any civil penalty imposed under this chapter.

(b) Any person who is entitled to bring an action under subsection (a) on the person's own behalf against a supplier for damages for a deceptive act may bring a class action against such supplier on behalf of any class of persons of which that person is a member and which has been damaged by such deceptive act, subject to and under the Indiana Rules of Trial Procedure governing class actions, except as herein expressly provided. **Except as provided in subsection (j),** the court may award reasonable attorney fees to the party that prevails in a class action under this subsection, provided that such fee shall be determined by the amount of time reasonably expended by the attorney and not by the amount of the judgment, although the contingency of the fee may be considered. Any money or other property recovered in a class action under this subsection which cannot, with due diligence, be restored to consumers within one (1) year after the judgment becomes final shall be returned to the party depositing the same. This subsection does not apply to a consumer transaction in real property, except for purchases of time shares and camping club memberships. Actual damages awarded to a class have priority over any civil penalty imposed under this chapter.

(c) The attorney general may bring an action to enjoin a deceptive act. However, the attorney general may seek to enjoin patterns of

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incurable deceptive acts with respect to consumer transactions in real property. In addition, the court may:

- (1) issue an injunction;
- (2) order the supplier to make payment of the money unlawfully received from the aggrieved consumers to be held in escrow for distribution to aggrieved consumers; and
- (3) order the supplier to pay to the state the reasonable costs of the attorney general's investigation and prosecution related to the action.

(d) In an action under subsection (a), (b), or (c), the court may void or limit the application of contracts or clauses resulting from deceptive acts and order restitution to be paid to aggrieved consumers.

(e) In any action under subsection (a) or (b), upon the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, the trial court, the supreme court, or the court of appeals may require the plaintiff, defendant, claimant, or any other party or parties to give security, or additional security, in such sum as the court shall direct to pay all costs, expenses, and disbursements that shall be awarded against that party or which that party may be directed to pay by any interlocutory order by the final judgment or on appeal.

(f) Any person who violates the terms of an injunction issued under subsection (c) shall forfeit and pay to the state a civil penalty of not more than fifteen thousand dollars (\$15,000) per violation. For the purposes of this section, the court issuing an injunction shall retain jurisdiction, the cause shall be continued, and the attorney general acting in the name of the state may petition for recovery of civil penalties. Whenever the court determines that an injunction issued under subsection (c) has been violated, the court shall award reasonable costs to the state.

(g) If a court finds any person has knowingly violated section 3 or 10 of this chapter, the attorney general, in an action pursuant to subsection (c), may recover from the person on behalf of the state a civil penalty of a fine not exceeding five hundred dollars (\$500) per violation.

(h) An elderly person relying upon an uncured or incurable deceptive act, including an act related to hypnotism, may bring an action to recover treble damages, if appropriate.

(i) An offer to cure is:

- (1) not admissible as evidence in a proceeding initiated under this section unless the offer to cure is delivered by a supplier to the consumer or a representative of the consumer before**

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1 the supplier files the supplier's initial response to a complaint;
2 and

3 (2) only admissible as evidence in a proceeding initiated under
4 this section to prove that a supplier is not liable for attorney's
5 fees under subsection (j).

6 If the offer to cure is timely delivered by the supplier, the supplier
7 may submit the offer to cure as evidence to prove in the proceeding
8 in accordance with the Indiana Rules of Trial Procedure that the
9 supplier made an offer to cure.

10 (j) A supplier may not be held liable for the attorney's fees and
11 court costs of the consumer that are incurred following the timely
12 delivery of an offer to cure as described in subsection (i) unless the
13 actual damages awarded, not including attorney's fees and costs,
14 exceed the value of the offer to cure.

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COMMITTEE REPORT

Madam President: The Senate Committee on Corrections, Criminal, and Civil Matters, to which was referred Senate Bill No. 509, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 5, line 36, after "is" insert ":

(1)".

Page 5, line 37, delete "to prove that the supplier made an offer".

Page 5, line 38, delete "to cure".

Page 5, line 40, delete "." and insert "; **and**

(2) only admissible as evidence in a proceeding initiated under this section to prove that a supplier is not liable for attorney's fees under subsection (j)".

Page 5, line 40, beginning with "If" begin a new line blocked left.
and when so amended that said bill do pass.

(Reference is to SB 509 as introduced.)

LONG, Chairperson

Committee Vote: Yeas 7, Nays 3.

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SENATE MOTION

Madam President: I move that Senate Bill 509 be amended to read as follows:

Page 4, line 16, after "property," insert "**including a claim or action involving a construction defect (as defined in IC 32-27-3-1(5) brought against a construction professional (as defined in IC 32-27-3-1(4)),**".

(Reference is to SB 509 as printed February 25, 2005.)

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